In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nashville Gas Company petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the District Court (Appendix A, *infra*, pp. A1-A16) is reported at 384 F. Supp. 765. The Opinion of the Court of Appeals (Appendix B, *infra*, pp. A17-A25) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (Appendix C, *infra*, p. A26). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the disparity between the treatment of pregnancy and other disabilities by an employer constitutes discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

STATUTES INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), provide as follows:

> "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

STATEMENT OF THE CASE

This case presents similar significant questions in the administration of Title VII of the Civil Rights Act of 1964, as *Liberty Mutual Insurance Company* v. *Wetzel*, 511 F.2d 199 (3d Cir. 1975), in which this Court recently has granted Certiorari (No. 74-1245, May 27, 1975). The question is whether the treatment of pregnant employees under a private employer's employment policies differently from other employees suffering from a non-work related disability constitutes sex discrimination under Title VII. Although this Court has recently held in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) that the exclusion of normal pregnancy from a State administered disability benefits plan did not constitute discrimination based on sex, it has not expressly held that such treatment is not discrimination based on sex under Title VII as well.

Nashville Gas Company does not have a disability insurance plan for its employees but does provide a specified number of sick leave days based on the employee's seniority. Pregnant employees who go on maternity leave do not receive any accumulated sick pay but are paid accumulated vacation time. An employee who has been on maternity leave and who wants to return to work does not retain any of her previously accumulated seniority for the purpose of bidding on permanent job openings although she is given priority over non-employees. Once she returns to permanent employment, she retains the seniority she had previously accumulated for purposes of pension, vacation, etc.

On September 13, 1973, Respondent filed charges with the Equal Employment Opportunity Commission ("EEOC"), claiming that Nashville Gas Company's failure

to provide pregnant employees the same treatment that it provided other employees suffering from temporary non-work related disabilities constituted discrimination based on sex in violation of Title VII. Respondent received a "Notice of Right to Sue" letter from the EEOC on April 5, 1974 and brought a class action in the District Court in timely fashion. The parties subsequently stipulated that the number of persons whom Respondent could properly represent was not so numerous that the action could be maintained as a class action under Rule 23, Fed. R. Civ. P.

The District Court held that Nashville Gas Company violated Title VII by denying sick leave pay to Plaintiff while she was on maternity leave since it granted sick leave pay to employees absent due to illness or other non-work related disabilities. The District Court also held that although the Company was justified in not holding Plaintiff's job open for her while she was on maternity leave, its policy of not permitting her to retain her previously accumulated seniority for job bidding purposes was unlawful discrimination. The District Court rejected Plaintiff's contentions that payment of maternity benefits under the Company's group health and hospitalization plan was discriminatory, that her being placed on pregnancy leave 25 days prior to the date on which her baby was born was unreasonable or arbitrary and that her subsequent termination was retaliatory.

The Sixth Circuit Court of Appeals affirmed the District Court's decision, and in doing so specifically rejected as inapplicable under Title VII this Court's decision in *Geduldig* v. *Aiello*.

REASONS FOR GRANTING THE WRIT

1. This case and those in five other Circuits, all involving the same basic question, raise a distinct issue of fundamental importance in the administration of Title VII.[1] This Court has granted certiorari in the *Liberty Mutual* case and petitions for certiorari are pending in the *American Telephone and Telegraph Company* and *General Electric Company* cases. In addition, numerous District Courts have addressed the issue.[2] The question is far from settled as to whether, under a private employer's employment policies, an employer discriminates by distinguishing between absences due to pregnancy and those attributable to temporary disabilities unrelated to pregnancy. For this reason alone, review by this Court is appropriate.

2. Such review is appropriate also because the decision below conflicts in principle with this Court's decision in *Aiello*. The Court there held that the equal protection clause of the Fourteenth Amendment did not require Cali-

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1. *See, Liberty Mutual Ins. Co.* v. *Wetzel*, 511 F.2d 199 (3d Cir. 1975); *Communication Workers of America, et al.* v. *American Telephone and Telegraph Co., Long Lines Dept.*, 379 F. Supp. 679, ... F.2d ..... (2d Cir., Mar. 26, 1975); *General Electric Co.* v. *Gilbert*, No. 74-1557, 4th Cir., *appeal docketed* May 15, 1974; *Holthaus* v. *Compton & Sons, Inc.*, ... F.2d ....., 10 FEP Cases 601 (8th Cir. 1975); *Hutchison* v. *Lake Oswego School District*, No. 74-3181, 9th Cir., *appeal docketed* Nov. 18, 1974.

2. *See, e.g., Vineyard* v. *Hollister School District*, 8 FEP Cases 1009 (D.C.Cal. 1974); *Zichy* v. *City of Philadelphia*, 10 FEP Cases 853 (D.C.Penn. 1975); *Sale* v. *Waverly-Shell Rock Bd. of Educ.*, 9 FEP Cases 138 (D.C.Iowa 1975); *Newmon* v. *Delta Airlines, Inc.*, 374 F. Supp. 238 (N.D.Ga. 1973); *CWA* v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D.Ill., Filed April 13, 1973); *CWA* v. *Southern Bell Tel. & Tel. Co.*, No. 18328 (N.D.Ga., Filed May 17, 1973); *CWA* v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y., Filed July 31, 1973); *CWA* v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D.Cal., Filed Sept. 28, 1973); *CWA* v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D.La., Filed July 5, 1973).

fornia to cover absences due to normal pregnancy under a State administered disability benefits plan. The court explicitly stated that the exclusion of pregnancy did not constitute discrimination on the basis of sex, observing (417 U.S. at 496-7) that "there is no risk in which men are protected and women are not." The Court added (417 U.S. at 496, n. 20):

> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second group includes members of both sexes."

It is patently clear that the Court in *Geduldig* rejected the idea that to treat pregnancy differently under one's employment policies is sex discrimination when one analyzes the dissent of Mr. Justice Brennan in which he states:

> "Such dissimilar treatment of men and women on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination." 417 U.S. at *501*.

As indicated above, the majority directly rejected Mr. Justice Brennan's contention on this point.

It is obvious that the decision in *Aiello* cannot be dismissed as one in which the discrimination was lawful because it was justifiable under traditional Fourteenth Amendment standards. The Court went further than that in *Aiello*. It concluded in unmistakable terms that the exclusion of normal pregnancy from a disability benefits plan does not constitute sex based discrimination—a conclusion which is as valid under Title VII as under the

Fourteenth Amendment. The Court below and the Third Circuit Court of Appeals in *Liberty Mutual* have concluded otherwise, holding that such an exclusion does constitute sex based discrimination for purposes of Title VII. The conflict is ripe for resolution at this time, as the Court has already recognized by granting certiorari in *Liberty Mutual*.

3. There are no distinctions between *Liberty Mutual* and this case that would justify a difference in the treatment of the two petitions. The cases arise under the same statute and in the same context, and present the same basic issue. Furthermore, the reasoning of the two Courts also is identical in all significant aspects. The Circuits have also sought to justify the results they reach by relying on EEOC guidelines (29 C.F.R. §1604.10(b)) to the effect that the exclusion of normal pregnancy from a disability plan constitutes sex based discrimination in violation of Title VII. These guidelines were issued before this Court declared in *Aiello*, 417 U.S. at 496-7, n. 20 that the exclusion of normal pregnancy is not sex discrimination "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other. . . ."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. In the alternative, the Court should hold the Petition pending the ultimate disposition of *Liberty Mutual*.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 74-288-NA-CV

NORA D. SATTY

v.

NASHVILLE GAS COMPANY

Memorandum

(Filed November 4, 1974)

This cause of action was brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) alleging sex discrimination in defendant's employment policies with respect to pregnancy. Plaintiff seeks back wages, lost benefits, attorney's fees and injunctive relief. Plaintiff further alleges that her employment was terminated because she complained about the allegedly discriminatory policies.

There is no dispute as to the jurisdiction of this court under Title VII of the Civil Rights Act of 1964.

Originally the cause was brought as a class action. However, the parties stipulated that the number of persons whom plaintiff may properly represent is not sufficiently numerous to permit maintenance of a class action under Rule 23, Federal Rules of Civil Procedure.

Simultaneously with filing of this action, plaintiff filed a motion for entry of a preliminary injunction requiring defendant to reinstate her as an employee and enjoining defendant from retaliatory measures. A hearing was held upon plaintiff's motion on July 10, 1974. At the close of the hearing, the court determined that a preliminary injunction would not be issued because plaintiff failed to establish that irreparable harm would be suffered by denial of the motion and it appeared that monetary damages could compensate plaintiff for any injury she might suffer.

The threshold question is whether or not defendant's employment policies, with respect to pregnancy, constitute unlawful sex discrimination.

I.

The parties have stipulated as to the following statement describing defendant's policy of health insurance:

> As a condition of employment, every employee of Nashville Gas Company is required to be covered under a group life, health and accident policy issued by Provident Life and Accident Insurance Company. The cost of such policy is borne half by the Company and half by the employees. In addition to other health and hospitalization benefits, said policy also provides for payment of 50% of the customary and reasonable fees incurred in connection with pregnancy. Such pregnancy benefits apply to female employees and dependent wives of male employees. Although the insurance plan terminates with respect to an employee at the time such employee's active employment ceases, the maternity benefits continue to apply for up to nine months after termination and if such benefits would have been payable had delivery occurred on the date such active employment ceases.

Plaintiff's theory is that defendant's group insurance program discriminates on the basis of sex because a reduced benefit is paid in the case of pregnancy when compared with hospitalizations for other causes. There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff.

The parties further stipulated that pregnancy is a temporary disabling condition resulting from a normal bodily function. In this case the plaintiff had a normal pregnancy and childbirth. Also, the parties have agreed that defendant does not have a disability insurance plan for its employees. This is not a situation where a female employee receives a lesser benefit for her disability than those received by males. Defendant's insurance plan pays no benefit whatsoever for disabilities. The only benefit under defendant's insurance plan is for payment of medical expenses. The issue in this case is whether defendant's insurance program discriminates unlawfully between male and female employees in the payment of medical expenses.

No evidence has been introduced to show a failure on defendant's part to comply with the Equal Employment Opportunity Commission guidelines on fringe benefits. Title 29, Code of Federal Regulations, Section 1604.9(d) provides:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and

families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit.

II.

It has been and is now the policy of defendant to require pregnant employees to take maternity leave. Although defendant's "Employee Policy Manual," of September 27, 1971, presents availability of maternity leave in permissive terms, to wit:

> In case of pregnancy, an employee, upon written request *may* be granted a leave of absence. . . (emphasis added)

actual practice demonstrates that a pregnant employee may not decline to accept maternity leave, and still retain employee affiliation with the defendant company. Once an employee is placed in maternity leave status, she may remain in that status for up to one year. There is no statement of policy concerning the status of an employee

on maternity leave who is unable to return to work after one year. A fair inference is that such an employee would be terminated.

Once an employee is classified as being in a leave status, i.e., leave of absence or pregnancy leave, it is defendant's policy to offer such an employee temporary work, when available, until a permanent position is open. After an employee returns from leave status and acquires permanent employment, the defendant credits such person with seniority previously accumulated for the purposes of pension, vacation, and other employee benefits based on seniority. However, defendant does not credit an employee returning from leave status who is subsequently classified as a temporary or permanent employee with previously accumulated seniority for the purpose of bidding on job openings. The significance of this policy is illustrated in the present case where plaintiff returned from pregnancy leave as a temporary employee after more than four (4) years of continuous employment, next preceding maternity leave, and defendant failed to place her in one of several permanent job openings. All of these openings were filled by other employees credited with greater job-bidding seniority even though plaintiff had the earlier date of initial employment. It appears that seniority is the primary factor in the job bidding process and failure to credit plaintiff with seniority for this purpose is the sole reason she failed to gain a permanent position with defendant following her return from maternity leave.

Defendant asserts that the job bidding policies are the same for all employees, male or female, returning from a leave status.

The gravamen to defendant's contention is that only pregnant women are required to take leave. In all cases

other than maternity the decision to take leave is entirely a voluntary matter with each employee.

It further appears that defendant maintains a policy of allowing leave in connection with non-work related illness or injury without loss of seniority or other indicia of good standing on the part of an employee where the non-work related disability does not concern pregnancy. It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave."

Defendant does not have a disability insurance plan for its employees, but does provide a specific number of sick leave days based on the employee's seniority. Employees, like plaintiff, who are placed on pregnancy leave are not paid for accumulated sick leave, but are paid for accumulated vacation time. Defendant's policy has been to allow employees who have been absent due to illness or non-work related disabilities to take "sick leave." Only in the case of pregnancy is an employee denied the right to take sick leave. It further appears that employees returning from long period of absence due to non-job related injuries do not lose their seniority and in fact their seniority continues to accumulate while absent.

Defendant asserts that the classification of employees as pregnant employees and non-pregnant employees for application of the aforementioned policies does not constitute unlawful sex discrimination under Title VII. Defendant acknowledges that a number of court decisions under Title VII, and the position of the Equal Employment Opportunity Commission, indicate that policies affording different treatment for temporary disability due to pregnancy than for all other non-work related disabilities is discrimination based on sex. However, it is asserted that the recent United States Supreme Court decision in *Geduldig* v. *Aiello*, ... U.S. ....., 41 L.Ed.2d 256, ... S.Ct. .....

(1974), determined that disparity of treatment between pregnancy related disability and other disabilities does not constitute sex discrimination. The primary source for defendant's argument is found in footnote 20 to the Court's opinion.

If defendant's reliance on the *Geduldig* decision were proper, then it would not be necessary to consider other cases in this area. For the reasons stated below, the court concludes that defendant's reliance on the *Geduldig* decision is not well founded.

In *Geduldig* the sole question presented was whether classifications under a disability insurance program established and administered under the laws of California violated the Equal Protection Clause of the Fourteenth Amendment. The asserted constitutional violation was based on the exclusion of disabilities in connection with normal pregnancies from coverage under the insurance program. The United States Supreme Court held that the exclusion of normal pregnancies from benefit coverage did not involve improper state action. The standard applied by the Court to test the constitutional question was one of "reasonableness." There was no question concerning the legitimacy of the state's action in establishing the disability insurance program to supplement the workman's compensation program. The analytic key to the *Geduldig* decision is found in the following language:

> This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others . . ." * * * Particularly with respect to social welfare programs, *so long as the line drawn by the State is rationally sup-*

portable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." * * *. (41 L.Ed.2d 256, 263-264. [emphasis added])

In finding a rational basis for the exclusion of normal pregnancies under the California disability insurance program, the Court noted several factors relating to the fiscal soundness of the program which were found sufficient.

It should be noted that *Geduldig* did not involve an assertion of unlawful action under the Civil Rights Act of 1964. The plaintiff in *Geduldig* was not an employee nor prospective employee claiming unlawful discrimination by reason of the State's employment practices. The question of whether the California disability insurance program sufficiently affects interstate commerce so as to be subject to the Civil Rights Act of 1964 does not appear to have been litigated.

In discussing the rational basis of California's exclusion of pregnancy benefits, the Court referred to the cases of *Reed* v. *Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, and *Frontiero* v. *Richardson*, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764. Both of these cases were brought under the Equal Protection Clause of the Fourteenth Amendment and in each case the Court found there was no rational basis for discrimination. In the *Reed* case the Court found a provision of the Idaho Probate Code giving preference to males in appointment of administrators to be violative of the Equal Protection Clause. Writing for the Court, the Chief Justice stated the test to be applied in Equal Protection type cases:

> . . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the

> power to treat different classes of persons in different ways. * * * The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (30 L.Ed.2d 225, 229).

In the final analysis the Court concluded that the Idaho statute had no rationale sufficient to sustain the different classifications established for men and women.

In the *Frontiero* decision the Court again found there was no rational basis for the distinction drawn in the payment of benefits between male and female members of the military services.

The standard applicable to state action under the Equal Protection Clause of the Fourteenth Amendment is distinct from the lawful power of Congress to establish different standards for conduct affecting interstate commerce. Under the Commerce Clause the Congress has plenary power to regulate all aspects of interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat (22 U.S.) 1, 6 L.Ed. (1824); *United States* v. *Darby*, 312 U.S. 100, 85 L.Ed. 609, 61 S.Ct. 473 (1941); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964); *Maryland* v. *Wirtz*, 392 U.S. 193, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (1968). In effect Congress has established a standard for testing employment discrimination that goes beyond the standard of "reasonableness" traditionally applied to the States under the Equal Protection Clause of the Fourteenth Amendment.

To further illustrate the distinction between the two standards of permissible discrimination, it is helpful to consider the legislative history of Title VII. Title 42 U.S.C. Sec. 2000e, et seq. presents the standard to be applied in cases of employment discrimination. In 1972 Congress amended Title VII by deleting a portion of 42 U.S.C. Sec. 2000e(c) which originally provided:

> . . . but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance. . .

The effect of the 1972 amendment was to broaden the scope of Title VII and extend the employment standard to the States.

The case of *Maryland* v. *Wirtz, supra,* demonstrates the power of Congress under the Commerce Clause to prescribe the standard against which conduct will be gauged if that conduct affects interstate commerce. In noting that States are susceptible to the congressionally prescribed standards, the Court stated:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations. (20 L.Ed.2d 1020, 1031)

The congressional standard to be applied under the Civil Rights Act of 1964 is stated in 42 U.S.C. Sec. 2000e-2 for those cases alleging discriminatory employment prac-

tices. The only exception to the standard that could have relevance in the instant case is found in 42 U.S.C. Sec. 2000e-2(e)(1) which provides that a classification based on sex, etc., is permissible *if* there is:

> . . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .

In light of the *Maryland* v. *Wirtz* decision, *supra,* it would appear that the proper standard to be applied in all employment discrimination cases properly brought under Title VII is the congressionally mandated standard outlined above.

All sex discrimination cases do not fall within the same category. As this discussion has illustrated, there are at least two classifications of sex discrimination cases: those arising under the Equal Protection Clause of the Fourteenth Amendment and those arising under Title VII of the Civil Rights Act of 1964. These two categories involve the application of different standards for the determination of whether distinctions based on sex are permissible. Under the Equal Protection Clause there need be only a "reasonable basis" for the legislative determination. However, under the Civil Rights Act of 1964, there must be an actual business necessity for employment policies that discriminate on the basis of sex. See *Moody* v. *Albemarle Paper Co.,* 474 F.2d 134 (4th Cir. 1973); *Diaz* v. *Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir. 1971); *Williams* v. *American St. Gobain Corp.,* 447 F.2d 561 (10th Cir. 1971).

The *Geduldig* case was brought under the Equal Protection Clause and not under Title VII. Thus, the standard involved was one of legislative reasonableness. Since *Geduldig* was not an employment case, it would be im-

proper to draw a negative inference as to the power of Congress to establish a different standard of permissible discrimination for employers admittedly affecting interstate commerce.[1] For these reasons, defendant's contention that *Geduldig* controls in the instant case is rejected.

In the opinion of this court, defendant's employment practices are discriminatory in the following respects: (1) only pregnant women are required to take leave and thereby lose job bidding seniority and no leave is required in other non-work related disabilities; and (2) only pregnant women are denied sick leave benefits while in all other cases of non-work related disability sick leave benefits are available. *Dessenberg* v. *American Metal Founding Co.*, 8 FEP Cases, 291 (D.C. Ohio); *Hutchison* v. *Lake Oswego School District*, 374 F.Supp. 1056 (1974); *Gilbert* v. *General Electric Co.*, 375 F.Supp. 367 (1974). Defendant has introduced no proof of any business necessity in support of these discriminatory policies. The court must therefore assume no justification exists.

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1. In *Geduldig* the minority opinion indicates a willingness to impose the congressional standard manifest in Title VII as the appropriate test under the Equal Protection Clause. The minority opinion further indicates a willingness to find State classifications based on sex to be unconstitutional *per se*. However, the majority opinion expressly relies on the "rational basis" formula as set forth in the traditional line of cases under the Equal Protection Clause. The dispute within the Court in *Geduldig* does not appear to be whether California's statute discriminates on the basis of sex, but rather the dispute focuses on whether that discrimination is permissible under the Fourteenth Amendment, i.e., it is a question of legislative reasonableness. The dissenting opinion ultimately rests on the conclusion that the State lacked a rational basis for the distinctions drawn. References to the provisions of Title VII and Equal Employment Commission decisions and regulations by the minority appear to furnish fuel for the proposition that the standard of reasonableness under the Equal Protection Clause should be strengthened to conform with the congressional statement of policy. Rejection of that argument by the majority does not rationally suggest that the standard established under Title VII is weakened or in anyway diminished in a case properly brought under the Civil Rights Act of 1964.

III.

Plaintiff further alleges that defendant's action in not holding her job open for her while she was on pregnancy leave constitutes discrimination based on sex. This allegation must be considered in light of certain business factors.

Plaintiff's principal duties prior to being placed on maternity leave involved the posting of merchandise accounts. It appears that defendant was considering prior to plaintiff's pregnancy, and has now initiated, the transfer of certain accounting functions to its computer processing department. Further, defendant has undertaken to discontinue its merchandise business. Both of these factors suggest a legitimate basis for the decision not to hold plaintiff's job open in the accounting department. The court discerns no discriminatory conduct by defendant with reference to this issue.

IV.

It is further asserted that defendant's action in requiring plaintiff to begin her pregnancy leave on December 29, 1972, was arbitrary and in violation of Title VII.

Although defendant's "Employee Policy Manual" suggests that pregnancy leave commence during the fourth month, actual practice shows that no set time is arbitrarily established to determine when leave shall be taken. Defendant's Vice President-Personnel has stated that several factors are weighed when reaching the decision to start pregnancy leave. These factors include: the opinion of the employee's doctor; the employee's duties; work area; and degree of public contact. Although the Vice President-Personnel was to be the final judge of when these factors should dictate the commencement of leave, there is no showing of abuse in reaching that decision.

Following employee holidays on Friday, December 22, and Monday, December 25, 1972, plaintiff failed to report for work on the next four consecutive work days. The proof shows that she was having a problem with water retention at that time and that she also had a common cold. After being placed on maternity leave on December 29, 1972, plaintiff gave birth to her child on January 23, 1973, some twenty-five days after maternity leave had commenced.

It is of paramount significance that defendant's policies as actually practiced do not fix an arbitrary month or date on which pregnancy leave must begin. The facts in each situation are considered on an individual basis. Given plaintiff's problem with water retention and the subsequent birth of her child on the 25th day of maternity leave, defendant's action does not appear to be arbitrary or irrational. See *Cleveland Board of Ed.* v. *LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 (1974).

V.

A further issue in this cause is whether the termination of plaintiff's temporary employment on April 13, 1973, was in retaliation for her complaining about defendant's employment policies with respect to pregnancy.

Plaintiff returned to work with defendant as a temporary employee on March 14, 1973. It was defendant's policy to place women returning from maternity leave in available temporary positions until a permanent opening was awarded on the basis of job bidding. Plaintiff worked as a temporary employee until April 13, 1973, when the temporary project to which she was assigned was completed. Plaintiff continued to apply for permanent job positions but was frustrated in her efforts by those policies

causing her to loose credit for accumulated seniority in job bidding. The court finds no evidence of retaliatory termination of plaintiff for assertion of her civil rights. However, it is clear that plaintiff's termination request was the result of her inability to retain permanent employment following forfeiture of her job bidding seniority rights by defendant.

VI.

The court concludes that plaintiff is entitled to the following relief:

1. Recovery of sick leave benefits that should have been paid during her maternity leave. Plaintiff is also entitled to have sick leave benefits credited and accumulated from the time she returned from maternity leave on March 14, 1973.

2. Back wages from March 14, 1973, until the present. The back wages shall be computed on the rate of pay earned by plaintiff on December 29, 1972, plus any across the board increases which may have occurred since that time. However, back pay will be reduced by amounts paid for temporary work with defendant, unemployment compensation received from the State of Tennessee, and wages from other employment.

3. Reinstatement as a permanent employee as of the date that the first permanent position after March 14, 1973, was filled with another employee having less seniority than plaintiff. Plaintiff will be credited with full seniority from the date of her initial hiring by defendant.

4. Recovery of reasonable attorney's fees.

The court authorizes the defendant to submit affidavits concerning plaintiff's status upon reinstatement. If there

has been a reduction in force by defendant which would have caused plaintiff's termination sometime after March 14, 1973, based on seniority computed from the date of her initial hiring, that fact may be shown to properly adjust the relief awarded plaintiff. Such affidavits should also reflect applicable "bumping" procedures, if any, to clarify whether or not plaintiff would have been entitled to a lesser position in defendant's company. Defendant may submit other data relating to the entitlement of plaintiff under the terms of this memorandum. However, defendant shall furnish copies of such affidavits to plaintiff's counsel and plaintiff shall have an opportunity to respond. The court will review such affidavits as are submitted relative to the determination of plaintiff's reinstatement and back wages, and if any material issue of fact is presented, a further hearing will be ordered on that matter. Defendant is allowed fifteen (15) days for the submission of affidavits and plaintiff shall have ten (10) days following defendant's submission to file counter-affidavits.

Counsel for plaintiff will submit an order consistent with the provisions of this memorandum.

/s/ L. Clure Morton
United States District Judge

APPENDIX B

No. 75-1083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORA D. SATTY,
Plaintiff-Appellee,

v.

NASHVILLE GAS COMPANY,
Defendant-Appellant.

AN APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed August 8, 1975.

Before: MILLER and ENGEL,* Circuit Judges, and TAYLOR,** District Judge.

TAYLOR, District Judge. After exhausting her remedies through the Equal Employment Opportunity Commission, this action was initiated by Nora Satty against the Nashville Gas Company for alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The District Court after hearing testimony from plaintiff denied her motion for a temporary injunction but thereafter on November 4, 1974 awarded reinstatement with seniority, back pay, including sick

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*Judge Engel did not participate in the consideration of this decision.

**The Honorable Robert L. Taylor, United States District Judge for the Eastern District of Tennessee, sitting by designation.

leave, and attorney fees. For the reasons set forth below, we affirm.

Undisputed, the facts are relatively simple. Plaintiff was initially hired by Nashville Gas as a junior clerk in the customer accounting department on March 24, 1969, and was later promoted to clerk on December 2, 1969. Having previously informed her employer in August 1972 of her pregnancy, she was placed on maternity leave on December 29, 1972, pursuant to the request of the vice-president in charge of personnel. Plaintiff's child was born twenty-five days later on January 23, 1973. Under Nashville Gas' policy, an employee can be granted pregnancy leave for a period of up to one year. Following the child's birth and after a six week checkup the employee is permitted to return to full time status when a permanent position becomes available and when the opening is not bid on by a permanent employee. During the interim between the six week checkup and reemployment on a permanent basis, Nashville Gas attempts to provide the employee with temporary work. As a consequence of this policy, the employee who is placed on pregnancy leave, unlike the male employee who is absent due to a nonwork-related disability, loses her accumulated seniority for job bidding purposes but otherwise retains her accrued vacation and pension seniority. Similarly, while the employee is permitted to apply her accumulated vacation time to her absence during pregnancy, sick leave may not be applied to a pregnancy-related absence. It is these latter two specific policies that are the object of plaintiff's attack.[1]

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1. Unlike *Gilbert* v. *General Electric Co.*, No. 74-1557 (4th Cir., June 27, 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, No. 74-1233 (3rd Cir., Feb. 11, 1975) *cert. granted*, May 27, 1975, 43 U.S.L.W. 3621, and *Communications Workers of America* v. *American Telephone & Telegraph*, No. 74-2191, 2d Cir., Mar. 26, 1975), Nashville Gas has no disability income protection plan for its employees.

On March 14, 1973, plaintiff returned to work as a temporary employee and was paid $130.80 per week, as opposed to $140.80 she earned prior to her leaving in December, 1972; however, this temporary employment ended on April 13, 1973 when her job was completed. Thereafter, in order to collect unemployment compensation insurance, plaintiff requested Nashville Gas to change her employment status from pregnancy leave to complete termination. It was stipulated by the parties that between December 29, 1972 and May 10, 1973, plaintiff applied for three full-time positions with Nashville Gas which became available; however, in each case a permanent employee with job seniority was awarded the position. Had plaintiff retained her job bidding seniority, she would have been awarded the positions.

Against this background, the principal issue before the Court is whether Nashville Gas' pregnancy policy violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5, as amended. In holding that defendant's policy is violative of the Civil Rights Act of 1964, we note that this question, as framed in the context of the impact of the Supreme Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is one of first impression in this Circuit. The same issue has been addressed in four other circuits.[2]

Central to the dispute here is the controlling impact of the Supreme Court's decision in *Aiello* and, more particularly, the weight of this Court should attribute to footnote 20 of that opinion. If *Aiello* and footnote 20 are dispositive of the issue whether a distinction between pregnancy related disabilities and other disabilities is sex based, then the threshold issue is easily resolved against

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2. *Gilbert* v. *General Electric Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra; Communications Workers* v. *American T. & T. Co., supra; Holthaus* v. *Compton & Sons, Inc.*, No. 74-1655 (8th Cir. Apr. 10, 1975).

plaintiff. If however, *Aiello* is not viewed as dispositive, then the Court must proceed to consider alternative constructions.

Aiello

California, in establishing an employee supported disability insurance system for nonwork-related injuries, chose to exclude pregnancy-related disabilities from the scope of the program's operation. Four women who had experienced a period of pregnancy-related disability challenged their exclusion from the program's benefits, and a three-judge district court found such exclusion violated the Equal Protection Clause. However, Justice Stewart speaking for the majority, adopted the "rationally supportable" standard of justification,[3] and held that the state's legitimate interest in seeking to protect the program's financial integrity and self-supporting character allowed it to address "itself to the phase of the problem which seems most acute to the legislative mind . . ."[4] Thus, cast in terms of the administration of a social welfare program, under the Court's interpretation the line drawn by the California legislature was between pregnancy-related disabilities and other disabilities, not between male and female employees. The Court peripherally amplified in footnote 20 its basis for concluding that disability and not sex was the line drawn by California legislature:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not ex-

3. 417 U.S., at 495.

4. *Id.* (citing *Williamson* v. *Lee Optical Co.* 348 U.S. 438, 489 (1955)).

> clude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."
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> 417 U.S. at 496, n. 20 (emphasis added)

It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area. To conclude that the Court's footnote is dispositive of an action brought under Title VII would be to ignore the traditional doctrine that the precedential value of a decision should be limited to the four corners of the decisions's factual setting.[5] The reasoning and policy behind this doctrine is readily appreciated when *Aiello* is compared with the facts in this case. Here, the question is whether the exclusion by a private employer of pregnancy-related disabilities from its sick leave and se-

5. *Cohens* v. *Virginia*, 6 Wheaton (19 U.S.) 264, 399-400 (1821); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944); *rehearing denied*, 323 U.S. 818 (1945). *Accord, Communications Workers of America* v. *American Telephone & Telegraph Co., supra*, slip opinion, at 2556-57.

niority program is a violation of a congressional statute, essentially, a dissimilar question from the issue before the *Aiello* Court—whether a legislative classification dividing disabilities into two classes for the purposes of a disability income protection program finds a rational basis. It is this very degree of dissimilarity that rejects a blind adherence to footnote 20. To import a different effect to footnote 20 would be to extend the impact of *Aiello* beyond its intended effect. It would appear harsh to read into footnote 20 that the Court expected, in passing on the propriety of a legislative classification under the Equal Protection Clause, to preclude all future discussion of statutory interpretation under a relatively new act such as the Civil Rights Act of 1964. Unless squarely faced with the Act, the Court has evidenced a reluctance to examine its parameters or the interpretive functions of the Equal Employment Opportunity Commission (E.E.O.C.).[6] While mindful of the Court's language in footnote 20, caution dictates that we not make it a talisman for Title VII actions.[7]

E.E.O.C. Guidelines

Turning from *Aiello* for guidance, it is logical that we should look to the agency charged with the administration of Title VII. In this regard, 29 C.F.R. § 1604.10(b) provides:

6. *See Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 n. 8, 653 n. 2 (Powell, J., concurring) (1974). In this vein, see also the remarks of Judge Bryan in *Communications Workers* v. *American Tel. & Telegraph Co., supra,* at footnote 11.

7. It is urged that because E.E.O.C. argued in its amicus brief in *Aiello* that the Court's holding would affect similar actions brought under Title VII and that because the Equal Protection issue was decided against the E.E.O.C., the Court intended its holding to extend to Title VII actions. Absent any reference at all to Title VII in *Aiello*, this argument if adopted, would impermissibly distort the principle of *stare decisis*.

"(b) Disabilities cause or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

We are urged in this case to reject the lessons of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring), which accord deference to the Commission's interpretation, under the authority of the Supreme Court's recent decision in *Esponoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 96 (1973). There, the Court, rejecting the Commission's regulation that discrimination on the basis of citizenship is tantamount to discrimination on the basis of national origin, noted that the agency had formerly held a different view, but, most importantly, the Court emphasized that "application of the guideline would be inconsistent with an obvious congressional intent . . ."[8] Unlike the situation before the Court in *Espinoza*, we do not have before us any legislative history indicating that the E.E.O.C. interpretation conflicts with the congressional intent. We are not in a position to say that the agency position con-

8. 414 U.S. at 94.

travenes the letter or spirit of the Act.[9] Thus, absent clear indicia in the form of legislative history that the agency interpretation is unreasonable or unnatural, we must defer to the Commission's construction of the statute as articulated under 29 C.F.R. § 1604.10(b).[10]

We note that in holding that disparate treatment between pregnancy leave and other sick leave constitutes a violation of Title VII, we reaffirm this Court's former decision in *Farkas* v. *Southwestern City School District*, 506 F.2d 1400 (6th Cir. 1974), where the District Court was affirmed and the conclusion reached that exclusion of normal pregnancy from a sick leave program constituted sex discrimination under Title VII. We are not persuaded that that position is incorrect. Though the legislative history of Title VII contains no explicit reference to sex discrimination, we learn from its declaration of policy that its principal aim was to eliminate artificial barriers that fostered disparate treatment, absent a compelling and founded reason for such disparity.

Appellant condents that the test of the validity of an employment policy under Title VII is not different from the test of validity under the Fourteenth Amendment.[11]

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9. It is similarly suggested that E.E.O.C.'s guidelines are in variance with the Wage and Hour Administrator's policy toward pregnancy under the Equal Pay Act, 29 U.S.C. § 206(d); 29 C.F.R. § 800.100, and the Office of Federal Contract Compliance's interpretation of Executive Order 11246, 3 C.F.R. 172, which permits a distinction to be drawn between pregnancy and other disabilities. However, here, we seek to interpret Title VII and not the Equal Pay Act or Executive Order 11246.

10. *Accord, Gilbert* v. *General Electric Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra; Communications Workers of America* v. *American T.&T. Co., supra; Holthaus* v. *Compton, supra; Vineyard* v. *Hollister Elementary School District* 64 F.R.D. 580 (N.D.Cal. 1974).

11. *Accord, U. S.* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973).

This argument, however, presupposes that the lawful scope of employment policies under the former Act is coextensive with the latter constitutional provision. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294.[12] Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation.

Relief

The District Court, finding that Nashville Gas' policy violated the provisions of 42 U.S.C. §2000e-5, ordered that plaintiff recover sick leave benefits that should have been paid during her maternity leave; back wages from March 14, 1973, including any across the board increases, and reduced by temporary wages and unemployment insurance; reinstatement with full seniority and recovery of reasonable attorney fees.

Under the guidelines of *Meadows* v. *Ford Motor Company*, 43 U.S.L.W. 2332 (1975), and *Head* v. *Timken Roller Bearing Company*, 486 F.2d 870 (6th Cir. 1973), we find the District Court's relief appropriate.

The judgment of the District Court is affirmed.

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12. *Accord, Communications Workers* v. *American Telephone & Telegraph*, slip opinion at 2562. *See also, Id.* at n. 12. It is submitted that an anomaly would exist if public and private employers were held to different standards under Title VII and the Fourteenth Amendment cases. It would appear, however, that any disparity would have been mitigated by inclusion of "governments" within the meaning of person under the 1972 Amendments. 42 U.S.C. § 2000e.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1083

NORA D. SATTY,
Plaintiff-Appellee,

v.

NASHVILLE GAS COMPANY,
Defendant-Appellant.

Before: MILLER and ENGEL, Circuit Judges, and TAYLOR, District Judge.

Judgment

(Filed August 8, 1975)

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

John P. Hehman, Clerk

By /s/ Grace Keller
Chief Deputy